The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GEORGE S. GABRIEL, NEIL E. CAMPBELL,
CHIN SOO PARK, ALBERT P. RUGGIERI,
JOHN E. SHEAFFER, DALE MURRAY,
ERIC A. DEITRICH, LYNN IRWIN, and RODNEY GERRINGER

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U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

Appeal No. 2006-1464
Application No. 09/173,134

HEARD: July 13, 2006

Before FRANKFORT, OWENS, and CRAWFORD, Administrative Patent Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 3, 8 and 9, all of the claims remaining in the application. Claims 4 through 7 have been cancelled.

Appellants' invention relates to a multipurpose rodent cage and ventilated rack and cage system for housing a variety of

rodent types including but not limited to a plurality of rats, mice, hamsters or guinea pigs. Independent claims 1, 3, 8 and 9 are representative of the subject matter on appeal and a copy of those claims can be found in the "Claims Appendix" attached to appellants' brief.

The prior art references relied upon by the examiner in rejecting the appealed claim are:

Sheaffer et al. (Sheaffer)	4,989,545	Feb. 5, 1991
Coiro et al. (Coiro)	5,894,816	Apr. 20, 1999

In addition to the foregoing patents, the examiner has also relied upon applicants' admitted prior art (hereinafter AAPA) found on pages 1 and 2 of the specification.

Claims 1 and 2 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sheaffer in view of AAPA.

Claims 3, 8 and 9 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Sheaffer in view of Coiro.

Rather than attempt to reiterate the examiner's commentary with regard to the above-noted rejections and the conflicting viewpoints advanced by appellants and the examiner regarding those rejections, we make reference to the answer (mailed October 3, 2005) for the examiner's reasoning in support of the rejections, and to appellants' brief (filed July 21, 2005) and reply brief (filed December 8, 2005) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and claims, to the AAPA and the applied prior art references, to the declarations of Neil Campbell, Dietrich Crase, Nick Guise and Betty Fatzie, and to the respective positions articulated by appellants and the examiner. As a consequence of our review, we have made the determinations which follow.

In rejecting claims 1 and 2 under 35 U.S.C. § 103(a), the examiner has determined that Sheaffer discloses a cage level barrier rodent cage (20) comprising a cage bottom portion (22) having a plurality of integral sidewalls (50), a floor (48) and an open top end which is to be closed off by a removable filter

bonnet (24). Sheaffer is silent concerning the size of the cages (20) and also with regard to the number and type of rodents to be housed in the ventilated cages. Thus, Sheaffer clearly does not teach having a rodent cage with a floor area in the range specified in claims 1 and 2 on appeal, i.e., "80 square inches ≤ l x w ≤ 110 square inches" as in claim 1 and "substantially 80 square inches" as in claim 2.

To address such deficiencies in Sheaffer, the examiner turns to the AAPA, noting that one of ordinary skill in the art reading page 1 of appellants' specification and being familiar with the Institute Laboratory Animal Resources (ILAR) guidelines would recognize that the floor area of a cage for laboratory animals is a parameter that may be varied depending on, among other things, the type and number of animals intended to be housed in a hygienic and humane environment (answer, pages 3, 4, 6 and 7). Based on the combined disclosures and teachings found in the AAPA and Sheaffer, the examiner concludes that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to develop a cage level barrier rodent cage like that in Sheaffer for housing two rats weighing up to 400 grams each wherein each cage has a floor area of 80 square inches

and thereby meets ILAR guidelines for such a rodent species as discussed in the AAPA.

Contrary to appellants' argument in the brief (page 10), although intended to house only a single species (i.e., two rats weighing up to 400 grams each), the resulting Sheaffer cage would also generally constitute a "multipurpose cage" for housing multiple species of rodents, as called for in claim 1 on appeal, in that such a cage with a floor area of 80 square inches would also be capable of housing other rodent species and meeting ILAR guidelines for such species, for example, up to five mice weighing 25 grams each. In that regard, we note that claims 1 and 2 on appeal are directed to a rodent cage per se having a floor area in the claimed range of 80 to 110 square inches, and that a cage like that in Sheaffer sized in the manner urged by the examiner for the purpose of housing two rats weighing up to 400 grams each and meeting ILAR guidelines would fall within the claimed range.

Appellants contend (brief, page 11) that the examiner has failed to demonstrate what reason a person skilled in the art would have for modifying Sheaffer with AAPA to obtain the

invention as claimed. We do not agree. The examiner has merely recognized and applied knowledge in the prior art that, prior to the present invention, 1) research laboratories performing animal studies typically had many types of rack and cage systems, each type being designed to house a specific animal species while meeting ILAR guidelines for that specific species, and consequently, that each cage and rack system had its own particular size and dimensions, and 2) each scientist performing an experiment, typically, would tend to design an animal cage and rack system in accordance with the specific arbitrary requirements of the particular experiment or study to be performed. This aspect of the examiner's position is further supported in paragraphs 5 and 8 of co-inventor Neil Campbell's declaration, signed June 26, 2003, and by the AAPA.

Accordingly, while we agree with appellants that there is nothing in the Sheaffer patent to suggest a cage wherein the overall dimensions are designed to simultaneously meet ILAR guidelines for more than one animal species and thus provide a standardized cage specifically designed to house multiple species of rodents, we again point out that claims 1 and 2 on appeal are directed to a rodent cage per se having a floor area in the

claimed range of 80 to 110 square inches, and that a rodent cage like that of Sheaffer sized in the manner urged by the examiner for the specific purpose of housing two rats weighing up to 400 grams each and meeting ILAR guidelines for such rodent species would have a floor area (e.g., minimally 80 square inches) within the claimed range and thus fall within the broad scope of those claims.

As for the weight to be accorded appellants' evidence of secondary considerations found in the declarations by Neil Campbell, Dietrich Crase, Nick Guise and Betty Fatzie, we have evaluated those declarations along with the evidence relied upon by the examiner in arriving at an overall determination of obviousness. In our opinion, the declarations are not entitled to substantial weight since they rely entirely on appellants' purported discovery and solution of a particular problem and on the advantages of providing a standardized cage and cage system capable of housing multiple animal species and that meets ILAR guidelines for each of the different animal types to be housed therein. However, as we noted above, claims 1 and 2 on appeal are of a much broader scope than the extent of appellants' evidence and are merely directed to a rodent cage per se of a

particular size range (i.e., having a floor area of 80 to 110 square inches) which is capable of functioning to house multiple species of rodents including a plurality of mice or rats. Thus, any cage level barrier rodent cage (e.g., like that in Sheaffer as modified) having a floor area of at least 80 square inches would meet the terms of claims 1 and 2 on appeal whether arrived at for appellants' reason or for a reason like that specified in the examiner's rejection. In that regard, it is not necessary that the applied prior art suggest a combination or modification to achieve the same advantage or result as discovered by appellants. See, e.g., In re Linter, 458 F.2d 1013, 173 USPQ 560 (CCPA 1972) and In re Dillon, 919 F.2d 688, 16 USPQ2d 1897 (Fed. Cir. 1990), cert. denied, 500 U.S. 904 (1991).

Given the breadth of the claims on appeal, it is irrelevant that the rodent cage resulting from the examiner's reliance on the combined teachings of Sheaffer and the AAPA was not, as in appellants' case, specifically designed to house multiple species of rodents and to comply with ILAR guidelines for all rodents to be housed in the cage. In the first place, we note that appellants' claims do not in any way mandate compliance with

ILAR guidelines. In addition, as was the case in In re Obiaya, 227 USPQ 58, 60 (BPAI, 1985), the fact that appellants have recognized another advantage which would flow naturally from following the suggestions of the prior art (e.g., that a cage of 80 square inches can house multiple rodent species and comply with ILAR guidelines for each such species) cannot be the basis for patentability when the differences would otherwise have been obvious.

In the final analysis, we find that a cage level barrier rodent cage having a floor area in the range claimed by appellants would have been obvious to one of ordinary skill in the art at the time of appellants' invention based on the combined teachings of Sheaffer and the AAPA. Accordingly, we will sustain the rejection of claims 1 and 2 under 35 U.S.C. § 103(a).

The next rejection for our review is that of claims 3, 8 and 9 under 35 U.S.C. § 103(a) as being unpatentable over Sheaffer in view of Coiro. In this instance, the examiner has noted that Sheaffer discloses a cage level barrier cage ventilated rack and cage system including a double sided rack

having a depth (see Figs. 1, 2 and 4, and col. 8, lines 57-64) and cages (20) disposed in the rack for housing animals involved in experiments. Again, the examiner notes that Sheaffer is silent concerning the size of the cages and also with regard to the number and type of rodents to be housed in the ventilated cages. Thus, it is recognized that Sheaffer does not teach having a rodent cage with a length of less than substantially 18 inches as specified in claim 3 on appeal, or a cage meeting the above length requirement and having a floor area in the range specified in claim 8 on appeal, i.e., 80 square inches $\leq$ l x w $\leq$ 110 square inches. Nor does Sheaffer disclose a rack and cage system wherein the cages have a length of less than substantially 18 inches and fit in the rack in such a way that a portion of the cages extends beyond the rack and wherein the depth of the rack and extending cage portions is less than or equal to substantially 36 inches, as specified in claim 9 on appeal.

To account for the differences between the above-noted claimed subject matter and Sheaffer, the examiner turns to Coiro. This patent is directed to a cage level barrier rodent cage having an enhanced floor space as compared with prior art cages,

but which maintains compatibility with existing wire bar lids and microbarrier tops (col. 2, lines 17-20). At column 1, lines 29-32, it is further noted that such cages are typically configured to fit or slide within rack units, and that the rack units may be connected to sources for automatically providing water, food, or air to the creatures inside the cages. Of particular interest to the examiner is the fact that Coiro specifically discloses a rodent cage (Fig. 3) having a length falling within appellants' claimed range of "less than substantially 18 inches," i.e., a length (L6) of 11.75 inches (col. 4, lines 57-58). We also note the disclosure in Coiro's claim 8, wherein it is indicated that the "base" (seen at 63 in Fig. 4) may have a length of "about 10 to 12 inches" and a width of "about 6.5 to 8 inches," thereby resulting in a cage having a base or floor area ranging from about 65 to about 96 square inches.

Based on the collective teachings of Sheaffer and Coiro, the examiner has concluded that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to develop a cage level barrier rodent cage like that in Sheaffer having a size range like that taught in Coiro and which is housed in a double sided ventilated rack like that taught in Sheaffer,

thereby resulting in a rack and cage system as broadly set forth in claims 3 and 8 on appeal. Concerning claim 9, the examiner has taken the position that it would have been obvious to one of ordinary skill in the art at the time of appellants' invention to have a portion of the cage of Sheaffer as modified by Coiro, when resting within the rack, extend beyond the rack depending on a chosen length one wishes to have to accommodate a particular type and number of animals in a hygienic and humane environment consistent with ILAR guidelines, while at the same time apparently meeting the "less than or equal to substantially 36 inches" limitation set forth in claim 9.

Appellants have urged on page 18 of the brief that "[a]n important feature of the claimed invention is that overall dimensions of the cage must be designed to simultaneously meet ILAR guidelines for more than one animal species" (emphasis added). We disagree, since the ILAR guidelines are not mentioned in any of the claims on appeal. For example, the only specific limitation on the size of the cage in appellants' claim 3 is that it have a length that is "less than substantially 18 inches." It is true that claim 3 also indicates that the cage and rack system therein is intended for housing a plurality of types of rodents

including a plurality of mice or rats, but the claim does not mandate a cage sized to be in compliance with ILAR guidelines. Similarly, claims 8 and 9 make no mention of the ILAR guidelines.

The cage of Coiro meets the size limitations set forth in claims 1, 2, 3, 8 and 9 on appeal and reasonably appears to be capable of housing a plurality of types of rodents including a plurality of mice or rats. Appellants have presented no convincing argument as to why it would have been unobvious to one of ordinary skill in the art at the time of the invention to use a cage sized in the manner taught in Coiro in the double sided rack of Sheaffer, thereby resulting in a system having the advantages noted in Coiro and also providing a ventilated rack and cage system like that broadly defined in claims 3 and 8 on appeal. As for claim 9 and the further requirement that the cages fit in the rack in such a way that a portion of the cages extends beyond the rack and wherein the depth of the rack and extending cage portions is less than or equal to substantially 36 inches, we agree with the examiner's position and further note that appellants' specification recognizes on page 2 that the largest cage racks in the prior art for housing rat cages have been dimensioned "to allow a rack supporting rat cages thereon to

pass through a standard door having a height of 6 feet 8 inches and a width of 36 inches." Thus, it is only reasonable that one skilled in the art looking to the rack and cage system resulting from the examiner's combination of Sheaffer and Coiro would size the rack with cages therein to fit through a standard size door and thus meet "the less than or equal to substantially 36 inches" limitation of claim 9.

With particular regard to appellants' evidence of secondary considerations, to the extent that such evidence relates to a cage and/or cage and rack system that must be designed to simultaneously meet ILAR guidelines for more than one animal species, and to the extent that such a feature led to its use in the industry as noted in the declarations of Neil Campbell, Dietrich Crase and Nick Guise, and to the sales alluded to in the declaration by Betty Fatzie, such evidence is not commensurate in scope with the broad claims on appeal. Thus, we give that evidence little weight in the ultimate determination of obviousness.

Weighing all of the evidence before us, it is our determination that the subject matter set forth in claims 3, 8

and 9 on appeal would have been obvious to one of ordinary skill in the art within the meaning of 35 U.S.C. § 103 based on the combined teachings of Sheaffer and Coiro.

Since the obviousness rejections with regard to claims 1, 2, 3, 8 and 9 before us on appeal have been sustained, it follows that the decision of the examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

CHARLES E. FRANKFORT)
Administrative Patent Judge)
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